purpose of the added words, namely to extend rather than to restrict the scope of the preceding words. Could it reasonably be held, for instance, that the effect of the expression 'carried on' in those additional words would be that a company transacting a single piece of business which took two years to complete was not carrying on business or not carrying on a business, whilst a company transacting half a dozen similar pieces of business and completing them all within one year was carrying on business or a business? I think not. The object and effect of the added words, as I read them, is to leave no room for doubt that a business shall not be the less a business because it has endured but for a brief period of time, whether the business be a single business transaction or a carrying on of business in the more usual meaning of the word. It may at this point be observed that all the English decisions which I have earlier cited, wherein isolated transactions were held to constitute adventures in the nature of trade, were arrived at notwithstanding the requirement in Schedule D of the English Act that the tax shall extend to every trade 'carried on' in the United Kingdom or elsewhere."

I respectfully agree with the reasoning and decision of Windham J.

I accordingly hold that the purchase and resale of the rubber estate by the taxpayer in the present case constituted a "business" of the taxpayer.

The second question for determination is whether the profit from this business of the taxpayer is assessable as income or is capital appreciation and therefore not chargeable to tax. On authority this profit is clearly income and therefore assessable. The test was clearly laid down by Lord Justice Clerk in *California Copper Syndicate* v. *Harris*.[13] His Lordship said (at page 165):

"It is quite a well settled principle in dealing with questions of assessment of Income Tax, that where the owner of an ordinary investment chooses to realise it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit in the sense of Schedule D of the Income Tax Act of 1842 assessable to Income Tax. But it is equally well established that enhanced values obtained from realisation or conversion of securities may be so assessable, where what is done is not merely a realisation or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business. The simplest case is that of a person or association of persons buying and selling lands or securities speculatively, in order to make gain, dealing in such investments as a business, and thereby seeking to make profits. There are many companies which in their very inception are formed for such a purpose, and in these cases it is not doubtful that, where they make a gain by a realisation, the gain they make is liable to be assessed for Income Tax.

What is the line which separates the two classes of cases may be difficult to define, and each case must be considered according to its facts; the question to be determined being — Is the sum of gain that has been made a mere enhancement of value by realising a security, or is it a gain made in an operation of business in carrying out a scheme for profit making?"

Upon these grounds I think this Appeal succeeds and must be allowed with costs.

Appeal allowed.

Solicitors: *Lee & Lee.*

LOH KWANG SEANG
v. PUBLIC PROSECUTOR

[A. Cr. J. (Rigby J.) September 5, 1960]

[Penang — Criminal Appeal No. 22 of 1960]

Criminal Law and Procedure — Charge — Accepting bribe — Offence of extortion — Appellate Court — Whether has power to alter finding and substitute conviction under a different provision of law.

Judgment — Grounds of decision signed and delivered — Supplementing by adding — Whether permissible — Effect of.

The appellant, a police Inspector in the Special Branch, Penang, was convicted in the Sessions Court under section 3(a) of the Prevention of Corruption Ordinance, 1950, of corruptly accepting a bribe, to wit, a sum of $135 from one F.S.F. as an inducement for forbearing to do an act in relation to his principal's affairs, namely, by representing to the said F.S.F. that he had committed an offence against the law and that he (the appellant) would forbear to take any further action against him.

The evidence showed that the complainant F.S.F. had recently made a trip to China and after his return to Penang was interrogated by the appellant, whereupon the complainant admitted that he had taken with him to China a sum of $500. The appellant then told him that because he had taken the money to China, he (the appellant) could detain him, cancel his citizenship certificate, take his finger-prints and change his identity card into a black one. The appellant then told him that since he had been in this country for many years and had never been in trouble before, if he gave the appellant $150 nothing would happen to him. The complainant could raise $135 only and offered this sum to the appellant who accepted the amount and this acceptance of $135 later became the subject matter of the charge upon which he was convicted.

Upon appeal it was argued that even assuming the facts adduced by the prosecution to be true, those facts did not support the offence of corruption with which the appellant was charged; that certain findings of fact were against the weight of evidence; that inadmissible evidence had been admitted; that the complainant was an accomplice; and that the judgment was against the weight of evidence.

Held: (1) on the facts adduced, if believed, it was a simple, straight forward case of extortion and the appellant ought to have been charged under section 383 of the Penal Code. The appellant was not acting in relation to the affairs of his principal by representing to the complainant that he had committed an offence against the law because the complainant had committed no offence. The conviction on the charge of corruption was therefore wrong in law;

(2) having heard the evidence, the learned President was satisfied that the testimony of the prosecution witnesses was true, and, to use his own words, he was "left in no doubt" as to the guilt of the appellant. The ground of appeal that the verdict was against the weight of evidence must accordingly be dismissed;

(3) there was nothing in the record to suggest that the learned President had been influenced by the inadmissible evidence. This ground of appeal must accordingly be dismissed;

(4) it is not permissible for a trial court having signed and delivered its ground of decision to the appellant to supplement the grounds of decision or amplifying them in any way. The conduct of the learned President in amplifying his grounds by adding a further 27 lines of typewritten material to it was both irregular and improper but it was not such conduct as can be said to have occasioned a miscarriage of justice or such as could be said to warrant or require or even justify the trial being regarded a nullity and the conviction being quashed. The only effect of it was, that the appellate Court must consider the original judgment as it stood and exclude any consideration of the parts added;

(5) the power of an appellate court to alter a finding by substituting conviction under a different provision of the law for the conviction found by the Magistrate is a power to be exercised with great caution. The learned President, at the conclusion of the evidence before him, had no jurisdiction to convict the appellant upon a charge of extortion without having amended the charge at an earlier stage and calling upon the appellant to plead to the amended charge, to enter upon his defence upon that charge and enabling him to recall any of the prosecution witnesses and to call such other evidence as he might wish so to do in his defence upon that amended charge;

(6) as it was not possible for the learned President to convict the appellant of the offence of extortion, a charge upon which he was never called upon to plead, it is not open to the High Court sitting in its appellate jurisdiction, to do an act which was not within the competence of the trial court;

(7) the appeal must be allowed and the conviction quashed.

Cases referred to:—

(1) *Ng Ee* v. *Public Prosecutor* [1941] M.L.J. 180.

(2) *Lau Chuan Chuah* v. *R.* [1955] M.L.J. 246.

(3) *Maqbool Singh Dhillon* v. *Public Prosecutor* [1956] M.L.J. 219.

(4) *Lew Cheok Hin* v. *R.* [1956] M.L.J. 131.

(5) *Soosay Dass* v. *Public Prosecutor* 1951 M.L.J. 57.

(6) *Daimon bin Banda* [1951] M.L.J. 11; [1953] M.L.J. 23, C.A.

CRIMINAL APPEAL.

David Marshall (*Lee Kok Liang* with him) for the appellant.

L. A. Massie (Deputy Public Prosecutor) for the respondent.

Rigby J. dealt with the facts and continued: At the commencement of this appeal Mr. Marshall submitted that the record was irregular in a material particular and drew my attention to the fact that after the notice of appeal had been lodged the learned President, having signed his grounds of decision and having caused a copy of it to be served upon the appellant's Counsel in compliance with section 302(3) of the Criminal Procedure Code, apparently thought fit to amplify those grounds by adding a further 27 lines of typewritten material to it. The additional page was sent to the appellant's Counsel with a request to substitute it for the original page. The appellant's Counsel very properly declined to do so. The original typewritten record as transmitted to this Court included, therefore, not the original grounds of decision but the grounds of decision as comprising and including the page subsequently substituted. It is right that I should say at once, however, that the learned President himself subsequently brought this matter to my attention and the original page (or a signed carbon copy thereof) is now before me.

Section 272 of the Criminal Procedure Code enacts that:—

"No Court, other than the High Court, when it has recorded its judgment, shall alter or review the same."

The conduct of the learned President was, in my view, both irregular and improper. But it was not, in my view, such conduct as can be said to have occasioned a miscarriage of justice or such as could be said to warrant or require, or even justify, this Court in saying that the trial and ultimate decision should be regarded as a nullity and the conviction quashed. The only effect of it is, in my view, that the Court must consider the original judgment as it stands and exclude any consideration of the part added. But even if one were to consider the part added, it is clear that it amounts, in effect, to no more than a recapitulation of part of the evidence already dealt with by him and a re-affirmation by him of his belief in the truth of that evidence. I refer to the earlier part of his judgment at page 14, in which, in dealing with an apparent discrepancy between the evidence of Shih Fee and Yoke Voon, the learned President went on to say that the discrepancy, when analysed, tended to show that these witnesses were "trying their best to tell the truth and that they are, in fact, telling the truth". Even if, therefore, it was proper for this Court to consider the part the learned President purported to add to his judgment — and I do not think it is proper — that additional part really carried the findings of the learned President no further.

I turn now to the vital question as to whether, on the facts disclosed upon the record, and accepted and believed by the learned President, this Court can, and should, alter the verdict and substitute a conviction under section 383 of the Penal Code.

The powers of an appellate Court are contained in section 310 of the Criminal Procedure Code which provides, *inter alia*, that if there is no sufficient ground for interfering the Court may — and it is to be noted that the power is discretionary — dismiss the appeal or may "alter the finding, maintaining the sentence, or, with or without, altering the finding, reduce or enhance the sentence."

The power of an appellate Court to alter a finding by substituting a conviction under a different provision of the law for the conviction found by the Magistrate is a power to be exercised with great caution. (see the observations of Cussen J. in *Ng Ee* v. *Public Prosecutor*).[1] I apprehend that it is fundamental that the power of an appellate Court is measured by the power of the original Court, and its jurisdiction, on appeal, is necessarily limited in each case to the same extent as the jurisdiction of the original Court from which that case comes. Before I can alter this conviction of corruption under the Prevention of Corruption Ordinance to one of extortion under section 383 of the Penal Code I am of the considered opinion that I must be satisfied that the learned President himself, at the stage of the proceedings at which he convicted, could properly have convicted the appellant of extortion — an offence of which he had never been charged, to which he had never been called upon to plead, and in respect of which, therefore, his defence had never been heard. In the case of *Lau Chuan Chuah* v. *Regina*,[2] Spenser-Wilkinson J. expressed his

opinion that there could be no justification in a summary trial for calling upon an accused for his defence in respect of one charge and then convicting him upon a different charge. He went on to say that the general provisions of section 177 of the Criminal Procedure Code were inapplicable to trials in subordinate Courts because the provisions of section 182 of the Code laid down the procedure to be followed in summary trials and expressly provided — in subsection (h), (i) and (j) — that at the close of the case for the prosecution it was incumbent upon the trial Magistrate to consider the charge in the light of the evidence before him and, if necessary, amend it and obtain a further plea thereon before calling upon the accused for his defence. He accordingly expressed the view that after hearing the defence it was not permissible for a subordinate Court to convict upon some different charge without specifically amending the charge, re-charging the accused, and giving him an opportunity to recall witnesses and to defend himself upon the new charge. With respect to the learned Judge and in the light of the later judgment of Buhagiar J. in the case of *Maqbool Singh Dhillon* v. *Public Prosecutor*,[3] and the cases cited therein, I think the *obiter dicta* expressed by Spenser-Wilkinson J. went too far. As I understand the decision of Buhagiar J. and from a consideration of the cases referred to by him, it is always open to a subordinate Court, without amending the charge, to convict the accused of a different charge providing that that charge in itself constitutes a complete minor offence composed of constituent elements necessarily included in the offence originally charged. The principle applicable is very clearly stated in *Mallal's Criminal Procedure*, 3rd edition, at page 231. † It reads:—

"Where an offence consists of several particulars, a combination of some only of which constitutes a complete minor offence, the graver charge gives notice to the accused of all the circumstances going to constitute the minor offence of which he may be convicted. The latter is arrived at by mere subtraction from the former. But when the circumstances constituting the major charge do not, necessarily and according to the definition of the offence imputed by that charge, constitute the minor offence also, the principle no longer applies, because notice of the former does not necessarily involve notice of all that constitutes the latter."

The decision of Buhagiar J. in *Maqbool Singh Dhillon's* case was followed by Taylor J. in *Lew Cheok Hin* v. *Regina*.[4] In this latter case the learned Judge illustrated with clarity the principle upon which a trial Court, without amending the charge, can properly convict for a "minor offence" arising out of the same original charge. The position, therefore, to my mind, is perfectly clear that it is only in cases where a complete minor offence is disclosed arising out of some of the elements necessary to constitute the major offence charged that a trial Court can convict for that minor offence without amending the charge and calling upon the accused to plead to that charge as amended.

Now, if A, a Police Officer, knowing that B, a member of the public, has committed an offence in respect of which it is the official duty of A to take action against him, accepts and receives a sum of money from B in consideration for forbearing to take that action, then A has committed the offence of corruption. If there are grounds for believing that the bribe motivated from B in the first instance, then under ordinary common law principles and subject to a consideration of the special provisions of section 13(3) of the Prevention of Corruption Ordinance, B is clearly an accomplice, the evidence of whom requires corroboration.

If A, knowing that B has committed an offence in respect of which it is A.'s duty to take action against him, threatens to take such action against him unless B pays him a sum of money and, in consideration of such money being paid by B, forbears to take such action, then A has committed the offences of both corruption and extortion. * The offence is "extortion" because the additional — and I emphasise the word "additional" — element is present of putting B in fear of injury by the threat of bringing a criminal accusation against him. It matters not whether the accusation be true or false: the offence is completed by the act of obtaining the money as a direct consequence of the threat to bring the criminal accusation. In such cases, whether the charge brought is corruption or extortion — or, indeed, both — B, as the unwilling giver of the money, need not of necessity be regarded as an accomplice to the offence committed by A. (see the cases of *Soosay Dass* v. *Public Prosecutor*[5] and *Daimon bin Banda*[6]).

But if A, acting outside the scope of his duty as a Police Officer, represents to B, falsely and inaccurately, that acts done by him constitute a criminal offence, and, under the threat of bringing a original accusation against him in respect of those acts — and of the consequences that will ensue as a result of that criminal accusation — dishonestly induce B to give him money, then the offence is one of plain extortion and not corruption. It is not corruption for the very good reason that, in making the accusation, A was at no time acting in the course of his duty. It is extortion because, as the very word implies, the money was extorted from B as a direct result of the threat of bringing a criminal accusation and of the consequences that would thereafter ensue. In such cases B, as the unwilling victim, is in no sense of the word an accomplice to the offence committed by A and his evidence, if accepted and believed, does not require corroboration.

These examples illustrate the distinction between corruption and extortion. They also serve to show that while the offence of corruption may include the offence of extortion, the latter is by no means a necessary element of the former in that extortion necessarily involves the additional and essential element of dishonestly inducing the victim to part with his money as

† 4th Edition, p. 244.

* But see *Vincent Lee* v. *R.* [1949] M.L.J. 296. — *Ed. M.L.J.*

a direct consequence of being put in fear of injury — whether injury to his person or injury arising from the threat of a criminal accusation. No such element of proof is required to sustain a conviction for corruption. In such cases it seems to me hopeless to contend that on a charge of corruption, where the offence proved is not corruption, but extortion, a Court can convict of the proved offences of extortion without amending the charge and giving the accused an opportunity to plead to that charge. One further point which appears to me to be conclusive. Both offences of corruption and extortion under section 383 of the Penal Code are punishable with a maximum penalty of three years' imprisonment and a fine. The offence of extortion, however, carries a further penalty of liability to corporal punishment. It would, indeed, be a curious departure from the ordinary principles of justice if, upon a charge of corruption a Court could convict the accused upon the more serious charge of extortion without giving him an opportunity to be heard in answer to that charge and then impose a sentence of corporal punishment which it would have had no jurisdiction to impose on the original charge. I am, therefore, wholly satisfied that the learned President, at the conclusion of the evidence before him, had no jurisdiction to convict the appellant upon a charge of extortion without having amended the charge at an earlier stage and calling upon the appellant to plead to that amended charge, to enter into his defence upon that charge and enabling him to recall any of the prosecution witnesses, and to call such other evidence as he might wish so to do in his defence upon that amended charge. If the learned President had no power to convict upon a charge of extortion without having amended the charge, then I am satisfied that this Court has equally no power to do so and that it would be wholly wrong for it now to do so. In arriving at this conclusion I have not found it necessary to deal with the argument very properly raised by Mr. Marshall that whilst the cautioned statement made by the appellant was admissible in evidence in a charge brought under the Prevention of Corruption Ordinance it is clearly inadmissible in evidence in a charge brought for extortion under the Penal Code and that if the learned President had, in fact, amended the charge to one of extortion and had convicted upon that charge, as amended it is impossible — and, indeed, improper — to speculate to what extent a consideration of the cautioned statement made by the appellant might have influenced the learned President in arriving at his finding of a conviction for extortion.

Nor do I consider that sections 176 or 177 of the Criminal Procedure Code can avail the prosecution in enabling the Court to alter the conviction at this stage from one of corruption to one of extortion. Section 176 provides that:—

"When upon a given set of facts it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences and any number of such offences may be tried at once or he may be charged in the alternative with having committed some one of the said offences."

Section 177 provides that if in the cases mentioned in section 176 the accused is charged with one offence and it appears in evidence that he committed a different offence for which he might have been charged under that Section, he may be convicted of the offence which he is shown to have committed, although he was not charged with it.

At first sight it might appear that section 177 might avail the prosecution in this instance. But it is clear that the two Sections must be read together and section 177 only comes into operation in cases to which section 176 applies. Section 176 only applies in cases where it is doubtful on the known facts which offence in law the accused can be proved to have committed. In such cases the prosecution may bring any number of alternative charges under different provisions of the law to cover the known facts. Under section 177, in the particular circumstances of section 176, even where alternative charges are not brought the Court can still convict on the proved facts under a different Section of the law even though no charge was specifically brought under the Section.

But an essential prerequisite, I repeat, to the application of these Sections is that the facts are known, but the law applicable to those facts is uncertain at the time of preferring the charges. Here, on the plain facts of the case as put forward by the prosecution there was no room for doubting that those facts, if proved and accepted by the Court, constituted extortion and not corruption. Those facts were all within the knowledge of the prosecution when the charge against the appellant was framed. There can be no question of the prosecution being misled or taken by surprise by the evidence of its witnesses. The plain fact is that the charge was badly and wrongly drafted and the evidence sought to be adduced could never sustain a conviction upon the charge as laid.

As Taylor J. pointed out in the case of *Lew Cheok Hin* v. *Regina* already cited, it is the express statutory duty of the trial Magistrate to consider every charge at the close of the case for the prosecution and, if necessary, to amend it then. It is regrettable in the extreme that the learned President did not comply with his statutory duty in this case

As I have already said, in my view, it was not open to the learned President to convict the appellant of the offence of extortion, a charge upon which he was never called upon to plead. If it was not open to the learned President to do so, then, for the reasons I have earlier stated, it is not open to this Court, sitting in its appellate jurisdiction, to do an act which was not within the competence of the trial Court.

For these reasons, utterly deplorable though it may be, and undoubtedly is, for a corrupt and dishonest Police Officer to go free, I have

reluctantly come to the conclusion that this appeal must be allowed, the conviction quashed, and the sentence set aside. I am not disposed to order a retrial. The Public Prosecutor must exercise his own discretion as to what action he thinks fit to take.

Before finally parting with this appeal I desire to say, and to place upon record, my emphatic view that it is utterly unsatisfactory and wholly wrong that serious charges of this nature levelled against a Senior Police Inspector should be left to be prosecuted by another Police Officer by way of summary trial in a subordinate Court. The Appellant was represented at his trial by Counsel. The trial lasted nine days and, as is apparent from the length of this judgment, involved points of law and decisions as to the admissibility of evidence that required both careful consideration and argument. What I have to say is in no sense a criticism of the Police Officer who prosecuted in this case and who is, no doubt, a competent, experienced and conscientious Prosecuting Officer. But, quite apart from the natural sense of distaste that he must have had in being called upon to prosecute a brother officer it was, in my most emphatic view, neither fair to him, nor to the trial Court — which is entitled to expect assistance from the prosecution in matters of law and evidence that may arise — nor, indeed, in the public interest that a serious charge of this nature should be left to be prosecuted by a Police Officer. I hope and trust that the practice — which is, unfortunately, particularly prevalent in Penang — of leaving serious criminal charges that may well involve points of law of difficulty and complexity to be prosecuted by Police Officers, will no longer continue.

In making these observations I am acutely aware that the unfortunate Legal Adviser in Penang, unlike many other States of the Federation, has not the benefit of the appointment of a Deputy Public Prosecutor — or even a qualified Legal Assistant — to assist him, but that he has to combine these two functions himself. But if it is seriously considered by the Attorney General's Department that the volume of work in Penang and Province Wellesley is not sufficient to justify the appointment of a Deputy Public Prosecutor — or even a qualified Legal Assistant — in Penang, then it is surely desirable to give immediate consideration to the commonly adopted practice of instructing Counsel from the Bar, on a fiat from the Public Prosecutor, to prosecute charges of a serious nature in which the public interest is involved. In this respect I assume it will be accepted that charges of corruption and extortion against Government Officers are matters in which the public interest is very seriously involved.

For these reasons I have given I am of the opinion, and I so order, that this appeal be allowed, the conviction quashed, and the sentence set aside.

Appeal allowed.

Solicitor: *Lee Kok Liang.*

Re M. A. MAJID'S APPLICATION

[O. C. J. (Rose C.J.) October 20, 1960]

[Singapore — Originating Motion No. 18 of 1960]

Certiorari — Trade Unions Ordinance (Cap. 154), s.15 — Cancellation of Registration of Trade Union — Registrar's grounds for cancellation — Appeal to Minister — Minister's confirmation of Registrar's Order — Defective Order — Whether Minister bound to hear appellant orally — Bias — Whether decision reasonable — Grounds for Intervention by the Court.

The Registrar of Trade Unions cancelled the Certificate of Registration of the Malayan National Seamen's Union under section 15 of the Trade Unions Ordinance (Cap. 154) on the ground that it was being used against the interests of seamen. On appeal to the Minister for Labour and Law the said order of cancellation was later confirmed. M. A. Majid, the President of the Union applied by Originating Motion for an order of Certiorari to have the order of the Minister confirming the Registrar's decision quashed on the following grounds:—

(1) that the Registrar's Order of Cancellation was defective in that it did not specify the ground of cancellation as required by section 15(5);

(2) that the Minister had refused to give the appellant/applicant an oral hearing on appeal and that the applicant had thereby been denied natural justice;

(3) that the Registrar and the Minister were biassed;

(4) that the action of the Registrar in cancelling the Union's registration and the Minister's confirmation thereof was unreasonable.

Held: (1) the statement in the body of the order of cancellation that the Union was being used against the interests of seamen coupled with a later statement of facts relating to the proposed cancellation was a sufficient compliance with section 15(5);

(2) the Minister was not obliged to hear the appellant orally provided that an adequate opportunity had otherwise been given to him to present the case for the Union which in fact had been done;

(3) bias was denied and had not been proved;

(4) it would be wrong for the Court to substitute its view of what is reasonable for that of the Minister and that in the circumstances there was no room for intervention by the Court.

Cases referred to:—

(1) *Local Government Board* v. *Arlidge* [1915] A.C 120 at p. 132.

(2) *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation* [1948] 1 K.B. 223 at p. 228.

APPLICATION FOR CERTIORARI.

A. Muthuswamy for the applicant.

A. V. Winslow (Solicitor-General) for the respondent.

Rose C.J.: On the 20th of January 1960 the Registrar of Trade Unions forwarded to the Secretary of the Malayan National Seamen's Union his Order of Cancellation of Certificate of Registration, of the same date, under section 15(4) of the Trade Unions Ordinance (Chapter 154).

In the same letter the Secretary's attention was drawn to the procedure to be followed in the event of his desiring to appeal to the Minister for Labour and Law against the Order of Cancellation.